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OCTOBER TERM, 1950

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No. 565

CHARLES ELMORE GROPLEY
CLERK

**RADIO CORPORATION OF AMERICA, NATIONAL
BROADCASTING COMPANY, INC., RCA VICTOR
DISTRIBUTING CORPORATION, ET AL., Appellants,**

vs.

**THE UNITED STATES OF AMERICA, FEDERAL
COMMUNICATIONS COMMISSION, AND COLUM-
BIA BROADCASTING SYSTEM, INC.**

**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS**

STATEMENT AS TO JURISDICTION

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**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION**

Civil Action No. 50C1459

**RADIO CORPORATION OF AMERICA, NATIONAL
BROADCASTING COMPANY, INC. AND RCA VICTOR
DISTRIBUTING CORPORATION,** *Plaintiffs,*

against

**UNITED STATES OF AMERICA AND FEDERAL COM-
MUNICATIONS COMMISSION,**

Defendants.

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, plaintiffs-appellants and intervener-appellants respectfully submit herewith their statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the orders of the statutory three-judge District Court of the United States for the Northern District of Illinois, Eastern Division, entered in this cause.

Opinions Below

The majority and dissenting opinions of the District Court are not yet reported. A copy of the opinions and

orders and of the findings of fact and conclusions of law and order in connection with the stay are attached hereto as Appendix A.

Jurisdiction

The orders of the District Court were entered on December 22, 1950, and January 23, 1951. A joint petition for appeal is presented to the said District Court herewith, to wit, on January 25, 1951. The jurisdiction of the Supreme Court of the United States to review this decision by direct appeal is conferred by Title 28, United States Code, Sections 1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the order on direct appeal of this case: *Columbia Broadcasting System, Inc. v. United States*, 316 U. S. 407 (1942); *National Broadcasting Company v. United States*, 319 U. S. 190 (1943); *United States v. Carolina Freight Carriers Corp.*, 315 U. S. 475 (1942); *United States v. Hancock Truck Lines, Inc.*, 324 U. S. 774 (1945); *Texas & Pacific Ry. Co. v. United States*, 289 U. S. 627 (1933); *I.C.C. v. Oregon-Washington R. Co.*, 288 U. S. 14 (1933).

Statutes Involved

Sections 303(c), (e), (f) and (g) and 402(a) of the Communications Act of 1934, as amended (48 Stat. 1082, 1093; 50 Stat. 197; 63 Stat. 108; 47 U. S. C. § 303(c), (e), (f), (g); 402(a); Sections 1253, 1336 and 2323 of the Judicial Code (62 Stat. 928, 931, 970; 63 Stat. 105; 28 U.S.C. § 1253, 1336, 2323); and Sections 4 and 10 of the Administrative Procedure Act (60 Stat. 238, 243; 5 U.S.C. § 1003, 1009) are set forth in Appendix B hereto.

Statement

Plaintiffs-appellants are Radio Corporation of America, National Broadcasting Company, Inc., and RCA Victor

Distributing Corporation (hereinafter referred to as "RCA", "NBC" and the "Distributing Corporation"). RCA is engaged, among other things, in research and development work in the field of electronics and particularly in the field of radio and television, both black and white and color. RCA is also engaged in the manufacture and sale of radio and television transmitting and receiving apparatus and tubes. NBC is engaged in sound and television broadcasting and in sound and television network broadcasting. The Distributing Corporation is engaged in the sale of television receivers and other products manufactured by RCA Victor Division, the manufacturing division of RCA, to dealers located in Chicago and other cities.

Intervener-appellants are Emerson Radio & Phonograph Corporation, Pilot Radio Corporation, The Radio Craftsmen, Incorporated, and Wells-Gardner & Co., manufacturers of radio and television receivers and equipment; Sightmaster Corporation, which was also a manufacturer of television receivers and equipment until production was discontinued by reason of the Order of the Federal Communications Commission (hereinafter referred to as the "Commission") under review; Local 1031, International Brotherhood of Electrical Workers, AFL, a labor union whose members are primarily employed by manufacturers of television receivers, parts and equipment; and Television Installation Service Association, an association of small business men engaged in the installation and servicing of television receivers.

On July 11, 1949, the Commission issued a Notice in which it proposed to hold a rule-making hearing to consider, among other things, color television systems, provided that such color systems met two criteria: First, that they could operate in the television channel 6 megacycles in width which is now used for black and white television, and,

second, that the television signals transmitted according to the color system could be received on existing television receivers "simply by making relatively minor modifications in such existing receivers."

Pursuant to this Notice and the various amendments thereto, a hearing was held before the Commission *en banc* commencing September 26, 1949 and continuing intermittently until May 26, 1950. During the course of these hearings evidence was presented to the Commission with respect to three proposed color television systems, each of which can operate in a 6-megacycle channel. The three color systems were those proposed by RCA, by Color Television Incorporated, and by Columbia Broadcasting System, Inc. (hereinafter called "CBS").

The system proposed by RCA is compatible with present black and white standards. Signals sent by a compatible color system can be received as black and white pictures on all existing television sets without making any modification in the sets. The CBS system is incompatible. Existing receivers can get no picture whatsoever from the incompatible CBS signals without extensive and expensive adaptation.¹

On September 1, 1950, the Commission issued its "First Report of Commission (Color Television Issues)", together with a "Second Notice of Further Proposed Rule-Making." In this Report the Commission did not adopt standards for any of the proposed color television systems. The Report found defects in all three proposed systems, and concluded that the Commission should allow more time for the development of all color systems. The Commission, however, conditioned the allowance of this additional time upon the acceptance by the television industry of two conditions:

(1) The first condition was that the television receiver

¹ No system proposed can produce a color picture on existing receivers without conversion.

manufacturing industry, over which the Commission has no jurisdiction, agree to build all future receivers in accordance with detailed specifications prescribed by the Commission, which would require extensive redesign of present production receiver models. These so-called "bracket standards" receivers would have to be so constructed that they could receive black and white pictures of either 525 lines, 60 fields per second (the existing standard, and the standard used by the RCA system), or 405 lines, 144 fields per second (which would be required for the reception of the CBS system), or any other combination of lines and fields within widely separated limits:

(2) The other condition imposed by the Commission was that the industry, broadcasters as well as manufacturers, acquiesce in such a drastic change in the existing black and white transmission standards *without a hearing*. This condition was prescribed in spite of the fact that the existing standards had been in effect since 1941, and no proposal for any such change had been made in the hearings.

The Commission also stated in its First Report that unless the industry accepted these two conditions it would forthwith adopt the CBS system.

The parties to the proceedings and the industry at large were requested to file comments by September 29, 1950.

With minor exceptions, those of the television manufacturing industry who submitted comments stated that to change their production of black and white receivers so as to conform to the Commission's specifications was impractical, unnecessarily costly to the public, and could not be done in accordance with the time schedule set by the Commission.

The RCA Comments included the Report of the Advisory Committee on Color Television to the Committee on Interstate and Foreign Commerce of the United States Senate

(the so-called Condon Committee Report), issued on July 10, 1950, and the RCA "Progress Report on Color Television and UHF" which had been submitted to the Commission on July 31, 1950.

The Condon Committee Report contained a detailed and scientific analysis of the three proposed color television systems which was substantially at variance with the First Report of the Commission. The RCA Progress Report set forth the developments and improvements in the RCA system which had taken place since the closing of the hearings on May 26, 1950.

On October 4, 1950, RCA filed a Petition with the Commission requesting the Commission to consider improvements in the performance of the RCA color television system, and to consider further all color television systems in order to obtain the additional information which the Commission stated in its First Report it should have before promulgating commercial color television standards, without insisting upon the two illegal and impossible conditions proposed with respect to bracket standards.

On October 10, 1950, the Commission, without any further hearings and without taking any additional evidence, denied the RCA Petition and adopted its Second Report. In its Second Report the Commission reaffirmed its First Report and concluded, without looking at them, that no improvements in the RCA or other compatible systems warranted a reopening of the record.

Simultaneously with the issuance of its Second Report, the Commission issued its Order, effective November 20, 1950—the Order here under review. By this Order the Commission promulgated commercial color television standards which adopt the CBS color television system on an exclusive basis. The effect of this Order is to prohibit the commercial broadcast of all other color television systems.

Plaintiffs-appellants brought this suit in the United States District Court for the Northern District of Illinois, Eastern Division, pursuant to the provisions of the Communications Act of 1934, as amended (48 Stat. 1064, 1093 and 63 Stat. 108; 47 U.S.C. § 402(a)) and of Title 28 United States Code (62 Stat. 931, 936, 968, 969; 63 Stat. 105; 28 U.S.C. §§ 1336, 1398, 2284, 2321-25) and Section 10 of the Administrative Procedure Act (60 Stat. 243; 5 U.S.C. § 1009), to enjoin, set aside, annul and suspend the Commission's Order. CBS, by agreement of the parties, was allowed to intervene in support of the Commission's Order. The intervener-appellants were permitted by the District Court, over objection of defendants, to intervene in support of plaintiffs' attack upon the Commission's Order.

Plaintiffs sought both an interlocutory and a permanent injunction. In the motion by plaintiffs for an interlocutory injunction, the District Court was also asked to issue a temporary restraining order in the event it was unable to decide plaintiffs' motion before November 20, 1950, the effective date of the Commission's Order.

Defendants moved for summary judgment and dismissal of the complaint on the ground that there was no genuine issue as to any material fact and that defendants were entitled to judgment as a matter of law.

A three-judge court was convened as required by Title 28, United States Code, Sections 2284 and 2325 (62 Stat. 968, 970). On the issues thus presented, the matter came on for hearing and oral argument was heard on November 14, 15, and 16, 1950.

Numerous affidavits were presented by the plaintiffs, as well as by the intervener-appellants, showing that irreparable damage would result if the Order was permitted to take effect. Plaintiffs' affidavits also set forth the various determinative facts which the Commission should have

considered before promulgating commercial standards for color television and, in addition, set forth the grounds upon which plaintiffs contend that the Commission erred in permitting an interested staff engineer to continue in the proceedings after his interest had been disclosed and objected to.

Opposing affidavits were filed by the defendants and by CBS, the defendant-intervener. There was also presented by the Commission a record of the proceedings held prior to the issuance of its Order.

At the conclusion of the hearing, the Court took the conflicting motions under advisement and at the same time entered a temporary restraining order "restraining and suspending until further order of this court the promulgation, operation and execution of the order of the Federal Communications Commission adopted October 10, 1950, effective November 20, 1950." The Court also made the findings of fact and conclusions set forth in Appendix A hereto.

On December 22, 1950, and January 23, 1951, the District Court entered orders granting summary judgment in favor of the defendants and against the plaintiffs, including the plaintiff-interveners, and dismissing the complaints, including the intervening complaints. One judge dissented. The Court unanimously continued in effect the temporary restraining order until April 1, 1951, or until terminated by the Supreme Court. The Court also unanimously re-adopted the findings and conclusions theretofore made in support of the temporary restraining order.

That part of the District Court's opinion which states the basis for its order reads as follows:

"Thus, as we evaluate the situation, there are two courses open, (1) to allow defendants' motion for a summary judgment, and (2) to vacate the order and

send the proceeding back to the Commission for further consideration in view of recent developments in the color television field as well as the rapidly changing economic situation. A pursuance of the latter course, assuming we have such authority, of which there may be doubt, would inevitably result in the prolongation of the controversy which badly needs the finality of decision which can be made only by the Supreme Court. In other words, the interests of all, so we think, will be better served with this controversy on its way up rather than back from whence it comes."

Questions Presented

1. Whether the District Court erred in failing to hold that the Federal Communications Commission violated the Administrative Procedure Act in refusing to consider relevant matter presented.

2. Whether the District Court erred in failing to hold that it was unlawful for the Commission to base its Order in important respects on "speculation and hope," and to refuse properly to inform itself.

3. Whether the District Court erred in failing to hold that it was unlawful for the Commission to base findings with respect to critical aspects of a dynamic science upon early evidence which was superseded during the hearings by later evidence that made the early evidence no longer representative of the facts.

4. Whether the District Court erred in failing to hold that the Order, conclusions and findings of the Commission were not based on substantial evidence.

5. Whether the District Court erred in holding that it was without power to consider relevant matter presented to the Commission, and which the Commission refused to consider, for the purpose of determining whether such evidence should have been considered by the Commission.

6. Whether the District Court erred in failing to rule on

many determinative issues of law and fact (including the issue of whether the Commission's Order was supported by substantial evidence), the decision of which is essential to the proper disposition of the appeal, and in referring the decision of such issues to the Supreme Court, stating that it could not see "why we should devote the time and energy which the importance of the case merits, realizing as we must that the controversy can only be finally terminated by a decision of the Supreme Court."

7. Whether the District Court erred in failing to hold that it was unlawful for the Commission to adopt standards for the broadcasting of color signals from which no picture whatsoever can be received on the television sets now in the hands of the public.

8. Whether the District Court erred in failing to hold that it was unlawful for the Commission to suppress competition by prohibiting the broadcasting of color signals which can be received on all existing black and white receivers as black and white pictures (compatible color), while permitting broadcasting of color signals which cannot be received on existing television sets (incompatible color).

9. Whether the District Court erred in failing to hold that it was unlawful for the Commission to base its Order on the non-compliance by the television industry with conditions which the Commission was without authority to impose.

10. Whether the District Court erred in failing to hold that the Commission abused its discretion and was arbitrary and capricious in adopting the incompatible color television standards over the virtually unanimous opposition of technical and engineering experts of the industry as well as of independent experts, without taking account of expert and impartial analysis and opinion fully avail-

able to it, without considering various improvements in compatible systems which took place after the close of the administrative hearings, and with the participation of a Commission engineer having an interest in the adoption of an incompatible system.²

The Questions Are Substantial

1. The instant case presents a substantial and important question with respect to the construction of the Administrative Procedure Act. The question is of general interest concerning not only the practices of the Federal Communications Commission but other federal administrative agencies as well.

With respect to rule-making proceedings of administrative agencies—which the color television proceedings before the Commission were—the Administrative Procedure Act, Section 4(b), provides in pertinent part (60 Stat. 239; 5 U.E.C. § 1003(b)):

“After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose.”

Appellants contend that this statutory requirement means just what it says—that the agency shall *consider* “all relevant matter presented.” This is precisely what the Commission refused to do in the instant case.

Plaintiff RCA, in response to a request by the Commission that comments be submitted, on September 28, 1950

² All other points set forth in the Assignment of Errors and Prayer for Reversal are also presented.

filed with the Commission its Comments. These included, among other matters, the RCA Progress Report and the Report of the Condon Committee.

The first of these two reports showed that RCA had made such improvements in its color television system that certain criticisms which the Commission had leveled at the system were without merit.

The second of these reports was prepared by the Condon Committee which had been organized at the request of the Chairman of the Senate Committee on Interstate and Foreign Commerce to give "sound, impartial, scientific advice" on color television. The conclusions of this group of eminent, independent scientists were at substantial variance with the findings and conclusions upon which the Commission seeks to justify its Order.

The defendants have not contended that the RCA Progress Report and the Condon Committee Report were not *relevant* to the issues before the Commission. Nor has it been contended that the reports were not *presented* to the Commission. The Commission nevertheless refused to consider these reports.

In these circumstances, appellants submit that the Commission's refusal to consider the reports was unwarranted and that the Commission had the positive statutory duty to consider them.

2. The instant case presents an important and substantial question with respect to the duties of the Commission as set forth in the Communications Act of 1934, as amended. The question is whether it is lawful for the Commission to fail properly to inform itself and, in addition, to base its administrative determination in important respects on "speculation and hope."

The Communications Act of 1934, as amended, Section 303(g), provides that the Commission shall

"Study new uses for radio, . . . and generally encourage the larger and more effective use of radio in the public interest."

The Supreme Court has held that this statutory directive imposes a "comprehensive mandate" upon the Commission. *National Broadcasting Company, Inc. v. United States*, 319 U. S. 190, 219 (1943). This mandate clearly includes the duty to inform itself adequately with respect to issues before it for determination. Indeed, the Commission's duty to keep itself fully informed has been recognized by the Commission itself in its heretofore consistent administrative practice and has been explicitly stated by the Commission as follows:

"It would be a violation of its statutory obligations for the Commission to disregard any facts which might foreclose a proper exercise of its duty to fix transmission standards . . ."³

Notwithstanding its statutory obligations, the Commission refused to consider at all such clearly relevant matters as the RCA Progress Report and the Report of the Condon Committee. In addition, when plaintiff RCA formally petitioned the Commission to consider improvements in the RCA color television system and to consider further all color television systems in order to obtain the additional information which the Commission stated in its First Report it should have before promulgating color television standards, the petition was denied. On the same day, the Commission issued the Order here under review and stated in its Second Report:

"None of the . . . improvements in systems . . . warrant reopening of the hearing."

³ FCC Report of May 28, 1940, In the Matter of Order No. 65 Setting Television Rules and Regulations for Hearing in FCC Docket No. 5806, p. 19.

This conclusion the Commission reached without even looking at the improvements of which it spoke—without informing itself as to the facts. The District Court stated in this regard,

“ . . . as we view the situation the most plausible contention made by plaintiffs is that the Commission abused its discretion in refusing to extend the effective date of its order so that it might further consider the situation, and particularly the improvement which it is claimed had been made by RCA and others.”

Instead, the Commission decided to and did admittedly base its Order in important respects on “speculation and hope.” Judge LaBuy in dissenting from the decision of the District Court, stated:

“ . . . it is difficult to understand why the Commission refused to hear additional evidence and chose instead a course of action, using its own words, based ‘on speculation and hope rather than on demonstration.’ ”

This, Judge LaBuy considered “an abuse of discretion and constituted action which was arbitrary and capricious.”

Appellants submit that the failure and refusal of the Commission to inform itself violated its statutory duties.

3. Proceedings of this kind are unique in that they involve a dynamic and rapidly progressing science. It is inherent in such a situation that later facts will in many instances entirely supersede earlier facts, and when they do the earlier facts are of no probative significance whatever. In view of this, findings with respect to critical aspects of such a science based upon early evidence which was superseded during the hearings by later evidence cannot be findings supported by substantial evidence.

The Commission has conceded that great technical strides were made during the nine-month course of the hearings

from September 26, 1949 to May 26, 1950. Yet in arriving at some of its critical findings the Commission relied upon testimony adduced in 1949 as to defects in RCA equipment which, by the 1950 stage of the hearings, had been replaced by improved apparatus that eliminated these defects.

Under the circumstances, appellants submit that evidence not relevant to the improved apparatus at the time the hearings closed cannot constitute substantial evidence. Appellants contend that the Commission's reliance upon obsolete evidence was arbitrary and unlawful.

4. The findings and the conclusions of the Commission are not supported by substantial evidence either with respect to the RCA system or with respect to the CBS system.

It has been pointed out under the preceding point that many of the findings of the Commission relating to the RCA system were based upon evidence which had been superseded in the record before the administrative hearings were closed. It is clear that findings based on superseded evidence are in no sense findings based upon substantial evidence.

Conversely, in the case of findings relating to the CBS system, the Commission's First Report clearly recognized that with respect to each of the seven performance characteristics considered, further information was needed. Yet the Commission 40 days later adopted the CBS system without obtaining the information which it had recognized was necessary. Appellants respectfully submit that these findings also cannot be said to be supported by substantial evidence.

In this connection it is significant to note that the District Court did not find that the Order, conclusions or findings of the Commission were supported by substantial evidence.

5. The District Court should have considered the evidence submitted to the Commission for the purpose of

deciding whether the Commission had wrongfully refused to look at such evidence. With respect to the contention that the Commission violated its statutory obligations in refusing to take account of pertinent information submitted to it after the close of the hearings and in refusing to look at subsequent developments of determinative significance, the majority of the District Court stated:

" . . . a number of critical findings are based upon evidence which was taken in the earlier stage of the proceeding which is not representative of the situation as it existed at the time the findings were adopted. Admittedly, much progress was made during the latter portion of the hearings and, as claimed, after the hearings closed, in the development of a compatible system of color television. Particularly was such progress made by RCA, and *as we view the situation the most plausible contention made by plaintiffs is that the Commission abused its discretion in refusing to extend the effective date of its order so that it might further consider the situation, and particularly the improvement which it is claimed had been made by RCA and others.*" (Italics supplied)

In addition, in stating the ground upon which it granted defendants' motions for summary judgment and to dismiss the complaint, the majority of the District Court had the following to say:

"Thus, as we evaluate the situation, there are two courses open, (1) to allow defendants' motion for a summary judgment, and (2) to vacate the order and send the proceeding back to the Commission for further consideration in view of recent developments in the color television field as well as the rapidly changing economic situation. *A pursuance of the latter course, assuming we have such authority, of which there may be doubt, would inevitably result in the prolongation of the controversy which badly needs the finality of decision which can be made only by the Supreme Court.*

In other words, the interests of all, so we think, will be better served with this controversy on its way up rather than back from whence it comes." (Italics supplied)

In spite of these two statements, the majority of the District Court also stated that it would constitute a trial *de novo* for the District Court to consider anything outside the record made before the Commission.

As has been set forth above, the RCA Progress Report and the Report of the Condon Committee were in fact part of the record before the Commission.

In addition, the consideration by the District Court of these two reports and the other matters which it is contended should have been considered by the Commission would not constitute a trial *de novo*. The District Court could not determine whether the Commission had properly discharged its statutory obligations without considering the material which appellants contend was wrongfully ignored by the Commission.

6. Many of the questions presented to the Supreme Court by the instant appeal are questions presented to, but left unresolved by, the majority of the District Court.

The court's opinion did not mention the contentions that:

1. The adoption of incompatible color standards was contrary to the statutory standard of public interest which governs Commission action.

2. The refusal to adopt compatible standards was arbitrary and contrary to the statutory standard of public interest.

3. The adoption of incompatible standards to the exclusion of compatible standards was an unreasonable suppression of competition and beyond the Commission's jurisdiction.

The court mentioned but did not resolve the contentions that:

1. The Commission's Order was not based on substantial evidence.⁴

2. The evidence alleged to support the Order was evidence taken early in the hearings which had been superseded and rendered obsolete by evidence of later technical developments achieved during the course of the hearings.

3. The Commission had abused its discretion and violated statutory command in refusing to consider relevant matter submitted, at the Commission's invitation, after the close of the hearings but before the close of the administrative record.

The reason for this is indicated by the statement in the District Court's opinion that the court felt its proceedings were "little more than a practice session" for the instant appeal. As the court elaborated this proposition, "in studying the case we have been unable to free our minds of the question as to why we should devote the time and energy which the importance of the case merits, realizing as we must that the controversy can only be finally terminated by a decision of the Supreme Court."

The District Court's view of its function would result in delegating to the Supreme Court primary responsibility for judicial review of administrative action. The Supreme Court cannot be converted into the court of first instance in cases of this character without controverting the judicial code and the Constitution.

⁴ The court stated that while the findings of the Commission were severely criticized it was not contended in the main that they are not supported by substantial evidence. This inference is inconsistent with the pleadings, briefs and oral argument of plaintiffs and plaintiff interveners. However, the court went on to state that a number of the critical findings were based upon evidence not representative of the situation as of the time the findings were adopted. The court also observed that plaintiffs' contention that the Commission abused its discretion in refusing to consider the situation further was a plausible one.

7. The Commission's Order permitting the commercial broadcasting of television signals which cannot produce a picture on existing sets is contrary to the public interest, as defined by the Commission itself.

The Supreme Court has held that the guiding statutory standard of the public interest, convenience or necessity is not to be interpreted as setting up a standard so indefinite as to confer unlimited power. On the contrary, the Supreme Court held that the public interest to be served under is the interest of the listening public in the larger and more effective use of radio. *National Broadcasting Company v. United States*, 319 U.S. 190.

The foundation decision by the Commission on the specific meaning to be given to the standard of the "public interest, convenience, or necessity" with respect to television transmission standards is its Report of May 28, 1940, which was occasioned by the Commission's refusal at that time to authorize commercial television. The Commission then found that the public interest required the fixing of television transmission standards which

(a) Permit all receivers to obtain pictures from all transmissions, thus providing a standard gauge and assuring continuity of service to the public;

(b) Permit the highest quality of service known to the art while leaving ample room for all foreseeable improvements; and

(c) Are adopted only after the potentialities of basic research have been fairly explored and the industry is in substantial agreement upon them.

The Order of the Commission here under review departs from all three of these elements of the public interest, convenience, or necessity.

The Order departs entirely from the principle that all receivers should be able to obtain pictures from all trans-

missions. The CBS system is an incompatible system, which means that none of the receivers in the hands of the public (9,000,000 in November, 1950) can receive any picture from CBS system transmissions. As stated by the District Court, even after existing receivers have undergone the necessary adaptation at a cost of more than \$50 per receiver, or a total public expense of nearly one-half a billion dollars, all that can be received from a CBS system color transmission is a degraded black and white picture. In order to receive color, existing receivers need a converter in addition to an adapter at an expense per set of more than \$100, or a total additional public expense of nearly a billion dollars.⁵

The Order deviates from the principle that commercial standards should permit the highest quality of service known to the art while leaving ample room for all foreseeable improvements. Of the three systems proposed, only the RCA system takes full advantage of the present state of the art and the RCA system leaves the fullest scope for future improvements within the framework of the standards called for by that system. The CBS system represents a retrogression even from existing black and white standards.

The Order was also entered before the potentialities of basic research had been fairly explored, and represents the first attempt of the Commission to adopt technical standards in the face of almost complete unanimity on the part of the technical experts of the industry that such standards should not be adopted.

8. That part of the Commission's Order which suppresses competition by not allowing the broadcast of compatible color television in accordance with the RCA sys-

⁵ These figures are based on the number of receivers owned by the public in November, 1950.

tem is unlawful and exceeds its jurisdiction, regardless of the validity of so much of the Commission's Order as permits broadcasting of color television on the CBS system.

This question involves the power of the Commission to prohibit the transmission of television signals where, as conceded by CBS and not contradicted by anyone else, broadcasting of such signals would not hurt anyone.

Television signals broadcast in accordance with the RCA system can be received on all existing receivers as a black and white picture without the owners so much as touching their receivers.

No contention is made that the quality of the black and white picture produced by the RCA color system is a ground for denying this system to the public nor that transmission of RCA color signals would utilize more of the radio frequency spectrum or interfere with other services.

The Commission's Order, of course, allows the continued transmission of television signals which will do no more than produce black and white pictures. The fact that television signals broadcast in accordance with the RCA system will also, on an appropriate receiver, produce a color picture is no ground for prohibiting such transmissions. The Communications Act gives the Commission no power thus to suppress competition. On the contrary, a policy of that Act, insofar as it relates to broadcasting, is to encourage competition.

There are no findings or conclusions which bring the Commission's refusal to permit broadcasting of the RCA color television system within the ambit of the Commission's statutory authority. Nor would any such findings or conclusions be supported by the record before the Commission.

9. The Commission's First Report clearly recognized the advisability of obtaining more information with respect to all color television systems before a final decision as to

commercial color television standards was made. The Commission, however, stated that it would do this only if the industry accepted two conditions; namely, if the television manufacturing industry, which is outside the Commission's jurisdiction, would build all future receivers in accordance with detailed specifications laid down by the Commission, and if new black and white standards could be adopted without a hearing.

Neither of these two conditions was lawful. Nevertheless, when the Commission failed in its attempt to impose these conditions, it proceeded to adopt the CBS system without obtaining the additional information.

Inasmuch as the Order is thus predicated upon two illegal conditions, it is unlawful.

10. As stated by Judge LaBuy in his dissent:

"It is conceded by all and it is self-evident that the best system of color television is a compatible one; that is, a system requiring no change whatever in existing receivers for the reception of black and white . . . pictures. Indeed, compatibility is the coveted goal of all engineers and scientists engaged in the television industry."

The only witnesses who testified in favor of the adoption of the CBS incompatible system were CBS engineers and Mr. Chapin, one of the Commission's staff engineers.

All the other industry engineers and impartial television experts who testified in favor of the adoption of any system, testified in favor of the adoption of an all-electronic, high-definition, compatible color television system such as the RCA system.

The Commission either ignored or sought to discredit all this testimony in favor of a compatible system and, in addition, deliberately ignored the Condon Committee's analysis of the three systems proposed. The Commission

also refused to look at evidence fully available to it which would have established the correctness of the testimony favoring a compatible system.

Although the Order purports to rest upon judgments with respect to a highly complicated electronics art, it is notable that the Commission found it necessary to try to discredit every disinterested industry expert who appeared before it, and that many of its findings are supported only by the testimony of CBS engineers or by Chapin.

As to Chapin, the record shows that he was the co-inventor of an automatic switch usable with the CBS system, but not with a compatible color system. While Chapin foreswore any financial interest in the invention, the interests of prestige and reputation through the adoption of the CBS system and the consequent use of his invention remain.

Although RCA objected, this engineer was allowed to continue in the proceedings and subsequently gave testimony favorable to the CBS system. In addition, Chapin had charge of the Commission's laboratory which tested the various color systems and he participated in the Commission's deliberations leading to the adoption of the Order.

Only two of the seven members of the Commission have had technical training and one of the two dissented from the adoption of the Order. This Commissioner was formerly Chief Engineer of the Commission. The rest are laymen.

In such a situation, namely, where laymen must make judgments of a highly complicated electronics art, they must of necessity rely to a large extent upon the opinions of their technical staff. In such a situation, it was improper for the Commission to permit Chapin to continue in the proceedings after his interest became known.

Dated: January 25, 1951.

[Signatures on pages 24 and 25]

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APPENDIX

**IN THE UNITED STATES DISTRICT COURT, NORTH-
ERN DISTRICT OF ILLINOIS, EASTERN DIVISION**

Civil Action No. 50-C-1459

**RADIO CORPORATION OF AMERICA, NATIONAL BROADCASTING
COMPANY, INC., and RCA VICTOR DISTRIBUTING CORPORA-
TION, Plaintiffs,**

vs.

**UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS
COMMISSION, Defendants.**

DECEMBER 20, 1950

**Before MAJOR, Circuit Judge, SULLIVAN and LA BUY,
District Judges.**

MAJOR, Circuit Judge. This action was brought to enjoin and set aside an order of the Federal Communications Commission, adopted October 10, 1950, effective November 20, 1950, which promulgated standards for the transmission of color television. Plaintiff Radio Corporation of America (RCA) is engaged, among other things, in research and development work in the field of electronics, and particularly in the field of radio and television, as well as in the manufacture and sale of radio and television transmitting and receiving apparatus and parts. Plaintiff National Broadcasting Company (NBC) is engaged in sound and television broadcasting, including network broadcasting. Plaintiff Victor Distributing Corporation is engaged in the sale of articles and products manufactured by the Victor Division of RCA. Both this distributing company and NBC are wholly owned subsidiaries of RCA. The defendants are the United States and the Federal Communications Commission.

The complaint sought an interlocutory injunction until the further order of the court and a permanent injunction upon final hearing. The defendants moved for a summary judgment and a dismissal of the complaint on the ground

that there was no genuine issue as to any material fact and that defendants were entitled to a judgment as a matter of law.

A three-judge court was convened, as required by Title 28 U.S.C.A. Secs. 2284 and 2325. On the issues thus presented, the matter came on for hearing and oral argument was heard on November 14, 15, and 16, 1950.

Prior to the time of oral argument, the Columbia Broadcasting System (CBS), also engaged in sound and television broadcasting, by agreement of the parties, was allowed to intervene in support of the Commission's order. Either during or previous to the oral argument, the following parties, over the objection of defendants, were permitted to intervene in support of plaintiffs' attack upon the Commission's order: Local No. 1031 of the International Brotherhood of Electrical Workers, representing 21,000 members, 18,000 of whom are employed in Chicago or vicinity in the manufacture of radio and television sets or in the manufacture of parts and in the assembling thereof; Pilot Radio Corporation; Emerson Radio and Phonograph Corporation; Wells-Gardner & Company, Sightmaster Corporation and Radio Craftsmen, Inc., all manufacturers of television and receiving equipment; and Television Installation Service Association, a trade organization engaged in the business of servicing and installing radios and television equipment in the Chicago area.

The statutes involved with respect to the jurisdiction of this court are Title 28 U.S.C.A. Secs. 1336, 1398, 2284, 2321-25 and Sec. 402 (a) of the Communications Act of 1934, as amended, Title 47 U.S.C.A. Sec. 402 (a). With respect to the legal authority of the Commission to adopt standards, the provisions of the Communications Act mainly involved are Secs. 4 (i), 301, 303 (b), (c), (e), (f), (g) and (r). Secs. 4 (i) and 303 (r) of the Communications Act endow the Commission with authority to make rules and regulations and issue such orders as may be necessary in the execution of its functions and to carry out the provisions of the Act. Sec. 303 (b) authorizes the Commission, as the public convenience, interest or necessity requires, to prescribe the manner of the service to be rendered by

stations, and Sec. 303 (e) gives similar authority to regulate the kind of apparatus to be used with respect to its external effects. Sec. 303 (g) provides, under the same standard of the public convenience, interest or necessity, that the Commission shall "study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest."

As has been shown, there was before the court at the time of the hearing plaintiffs' prayer for an interlocutory injunction and defendants' motions for a summary judgment and for dismissal of the complaint. Numerous affidavits were presented by the plaintiffs as well as by the plaintiff-intervenors, showing that irreparable damages would result if the order was permitted to take effect. Opposing affidavits were filed by the defendants and by CBS, the defendant-intervenor. There was also presented by the Commission a record of the proceedings, upon which its order was predicated.

At the conclusion of the hearing, the court took the conflicting motions under advisement and at the same time entered a temporary restraining order "restraining and suspending until further order of this court the promulgation, operation and execution of the order of the Federal Communications Commission adopted October 10, 1950, effective November 20, 1950." As a basis for this order the court entered findings of fact, including the finding, among others, that irreparable damages would result to plaintiffs and intervenors unless the Commission's order was restrained and suspended during the consideration and determination of the issues before the court, and that such temporary suspension would be in the public interest.

The order sought to be set aside has been the subject of attack on many fronts, which may be generally classified under two contentions, (1) that the order is contrary to the public interest, and (2) that its adoption represents an arbitrary and capricious attitude on the part of the Commission. Under these two general categories there are, of course, many subsidiary issues. The defendants concede that RCA has an interest which permits the main-

tenance of the instant suit, but that there is an absence of such interest on the part of the other plaintiffs, as well as on the part of the intervening plaintiffs. For the purpose of this decision, we shall assume that all the plaintiffs, as well as the intervenors, are properly before the court.

After listening to many hours of oral argument by able counsel representing the respective parties, we formed some rather definite impressions relative to the merits of the order, as well as the proceedings before the Commission upon which it rests. And our reading and study of the numerous and voluminous briefs with which we have been favored have not altered or removed those impressions. Also, in studying the case, we have been unable to free our minds of the question as to why we should devote the time and energy which the importance of the case merits, realizing as we must that the controversy can only be finally terminated by a decision of the Supreme Court. This is so because any decision we make is appealable to that court as a matter of right and we were informed during oral argument, in no uncertain terms, that which otherwise might be expected, that is, that the aggrieved party or parties will immediately appeal. In other words, this is little more than a practice session where the parties prepare and test their ammunition for the big battle ahead. Moreover, we must give recognition to our limited scope in reviewing an order of an administrative agency. While citation of authority in this respect is hardly necessary, it may not be amiss to make reference to a few recent Supreme Court opinions.

In *American Telephone & Telegraph Co. et al. v. United States et al.*, 299 U. S. 232, 236, wherein the court had under review an order of the instant defendant Commission, the court stated: "This court is not at liberty to substitute its own discretion for that of administrative officers who have kept within the bounds of their administrative powers. * * * it is not enough that the prescribed system of accounts shall appear to be unwise or burdensome or inferior to another. Error or unwisdom is not equivalent to abuse."

In *Federal Security Administrator v. Quaker Oats Co.*, 318 U. S. 218, 227, the Court of Appeals for this Circuit set aside the order of an administrative agency. The Supreme Court reversed and with reference to review provisions of administrative action, stated: "Under such provisions we have repeatedly emphasized the scope that must be allowed to the discretion and informed judgment of an expert administrative body. [Citing cases.] These considerations are especially appropriate where the review is of regulations of general application adopted by an administrative agency under its rule-making power in carrying out the policy of a statute with whose enforcement it is charged." And further the court, referring to the judgment of the administrative agency, stated (page 228): "That judgment, if based on substantial evidence of record, and if within statutory and constitutional limitations, is controlling even though the reviewing court might on the same record have arrived at a different conclusion."

More recently, in *National Broadcasting Co., Inc. et al. v. United States et al.*, 319 U. S. 190, 224, the court reviewed and sustained an order of the instant Commission, and in doing so stated: "The Regulations are assailed as 'arbitrary and capricious.' If this contention means that the Regulations are unwise, that they are not likely to succeed in accomplishing what the Commission intended, we can say only that the appellants have selected the wrong forum for such a plea. * * * Our duty is at an end when we find that the action of the Commission was based upon findings supported by evidence, and was made pursuant to authority granted by Congress. It is not for us to say that the 'public interest' will be furthered or retarded by the Chain Broadcasting Regulations. The responsibility belongs to the Congress for the grant of valid legislative authority and to the Commission for its exercise."

Thus, with our scope of review so firmly delineated, we turn to a brief statement, if that is possible, of the proceedings which culminated in the order under attack. The Commission for many years had considered the question of color television. CBS had formerly proposed a system, which was denied in 1947. The instant proceedings, or

that part which related to color television, were initiated by the Commission's notice of July 11, 1949 of further proposed rule-making relative to color television. This notice proposed among other things to consider color television systems, provided that such systems met two criteria: first, that they operate in a six-megacycle channel (the frequency space allotted to black and white television broadcasting stations); and second, that the pictures be received on existing television receivers "simply by making relatively minor modifications in such existing receivers," and the notice provided, "following the closing of the record and the conclusion of oral arguments, the Commission upon consideration of all proposals, counter-proposals, and evidence in this proceeding will adopt such rules, regulations and standards as will best serve the public interest, convenience or necessity." In response to this notice, comments relating in whole or in part to color television were filed by numerous parties. CBS, RCA and CTI (Color Television, Inc.) were the only parties who appeared as proponents of their own color television systems.

The hearing, participated in by all members of the Commission, commenced September 26, 1949 and ended May 26, 1950. In all, fifty-three different witnesses were heard and 265 exhibits received. The transcript of the hearing covers 9717 pages. During the period from November 22, 1949 to February 6, 1950, extensive field tests were made of the three systems proposed. Progress reports concerning these tests were filed with the Commission by the three proponents during December 1949 and January 1950. Comparative demonstrations of the three proposed systems were made on different dates until May 17, 1950. In response to the Commission's notice, proposed findings and conclusions were filed by proponents of the three systems.

On September 1, 1950, the Commission issued its first report, in which it made detailed findings and conclusions concerning the three proposed color television systems and set forth minimum criteria which such a system would have to meet in order to be considered eligible for adoption. CTI is not a party to this proceeding and there is no occa-

sion to refer to the findings as to its proposed system. We set forth in a footnote the basic findings as to the system proposed by RCA and that proposed by CBS.⁶

Notwithstanding the findings favorable to the CBS system, the Commission declined in its first report to adopt that system. Instead of and concurrently with its first report, the Commission issued a second notice of further proposed rule-making, suggesting the adoption of bracket standards in the existing monochrome television system

As to RCA:

"(1) that the color fidelity of the RCA picture is not satisfactory and that there appears to be no reasonable prospect that the defects can be overcome;

(2) that the texture of the RCA color picture is not satisfactory and that it is difficult to see how this defect can be eliminated;

(3) that the receiving equipment utilized by the RCA system is exceedingly complex and that there is no assurance, even if the tri-color tube is successfully developed, that the RCA receivers will not continue to be unduly complex and difficult to operate;

(4) that the equipment which RCA utilizes at the transmitting station is exceedingly complex and that there is no assurance that satisfactory commercial type station equipment can be built;

(5) that the RCA system is much more susceptible to certain kinds of interference than standard black-and-white or the CBS color system;

(6) that there is not adequate assurance of RCA's ability to network color of proper quality over existing facilities; and

(7) that the RCA system has not been sufficiently field tested."

As to CBS:

"(1) that CBS produces a color picture that is 'most satisfactory from the point of view of texture, color fidelity and contrast';

(2) that the CBS receivers and station equipment 'are simple to handle' and within the economic reach of the public;

(3) that though the CBS system is susceptible to flicker to a greater degree than standard black-and-white, the problem is not serious, since flicker, which results from brightness, does not appear at the brightness level which is adequate for home use;

(4) that while the CBS system has less 'geometric resolution' than black-and-white, the addition of color more than outweighs this loss, and that the black-and-white pictures produced from CBS color are acceptable; and

(5) that while as a practical matter the apparatus now used by the CBS system is limited either to projection receivers of unlimited size or direct-view pictures of 12½ inch size, this size limitation will be eliminated if and when a commercial tri-color tube is successfully developed, and that in any event the public might well prefer a 12½ inch color picture to a 16 inch black-and-white picture and should not be deprived of that choice."

and invited interested parties and all manufacturers to submit comments on the proposal. This proposal embodied a method by which brackets would be incorporated in the receivers thereafter manufactured so as to permit such receivers to receive black and white pictures from present transmissions as well as color transmission by CBS. The stated purpose of this proposal was to preserve the status quo on compatibility.⁷ Maintaining the status quo on compatibility required the construction of receivers capable of receiving field sequential color transmissions in black and white. Comments upon the proposed bracket standards were received from thirty-three interested parties and television receiver manufacturers which disclosed an almost unanimous opinion on the part of manufacturers and other interested parties that such a system was not capable of being produced within the time limits fixed by the Commission.

On October 4, 1950, RCA filed a petition requesting the Commission to view the improvements made in the performance of the RCA color system between December 5, 1950 and January 5, 1951, and that the Commission view further experimental broadcasts of the three proposed color systems during the period to June 20, 1951, before reaching a final determination with respect to color standards. This request by RCA was denied, and on October 10, 1950, the Commission issued its second report, which concluded that the field sequential color system should be adopted. No testimony, oral or written, was received by the Commission in the interim between the issuance of its first and second report.

In its second report (issued October 10, 1950) the Commission, with reference to its first report, stated: "The Report stated that in the Commission's opinion, the CBS system produces a color picture that is most satisfactory from the point of view of texture, color fidelity and contrast. The Commission stated that receivers and station equipment are simple to operate and that receivers when

⁷ The term "compatibility" describes a situation in which no change whatever is required in existing receivers in order to enable them to receive as black and white picture a picture transmitted in color.

produced on a mass marketing basis should be within the economic reach of the great mass of purchasing public. The Commission further found that even with present equipment the CBS system can produce color pictures of sufficient brightness without objectionable flicker to be adequate for home use and that the evidence concerning long persistence phosphors shows that there is a specific method available for still further increasing brightness with no objectionable flicker. Finally, the Commission pointed out that while the CBS system has less geometric resolution than the present monochrome system the addition of color to the picture more than outweighs the loss in geometric resolution so far as apparent definition is concerned."

Simultaneously with the second report the Commission entered the order under attack, amending the Commission's Standards of Good Engineering Practice, to provide for standards of color television transmission in accordance with the field sequential system (CBS system) effective November 20, 1950. Commissioners Sterling and Hennock dissented from the Commission's second report. On the date of the issuance of its second report, the Commission also denied the petition of RCA to postpone a final determination of the color proceedings and to have further demonstrations of the three proposed color systems.

While the findings of the Commission are severely criticized, it is not contended in the main that they are not supported by substantial evidence. It is pertinently pointed out, however, that a number of critical findings are based upon evidence which was taken in the earlier stage of the proceeding which is not representative of the situation as it existed at the time the findings were adopted. Admittedly, much progress was made during the latter portion of the hearings and, as claimed, after the hearings closed, in the development of a compatible system of color television. Particularly was such progress made by RCA, and as we view the situation the most plausible contention made by plaintiffs is that the Commission abused its discretion in refusing to extend the effective date of its order so that it might further consider

the situation, and particularly the improvement which it is claimed had been made by RCA and others.

On the merits of the case, however, with which we are directly confronted by reason of defendants' motion for a summary judgment, much of plaintiffs' argument—in fact, the major portion of it—is predicated upon matters outside the record made before the Commission, and without going into too much detail we think it relevant to refer to some of such matters. While many affidavits offered by the plaintiffs as well as the intervening plaintiffs are proper, no doubt, to show damage in support of their asserted right to an injunction, many of them go far beyond this purpose and contain a recitation of alleged facts directly in conflict with the findings made by the Commission. Typical of such affidavits is that of Dr. C. B. Jolliffe, Executive Vice President in charge of the RCA Laboratories. His affidavit, in addition to showing damages which will be sustained by RCA as a result of the order, goes extensively into the alleged merits of the RCA system, the alleged demerits of the CBS system and the alleged errors committed by the Commission in reaching its decision. And much of plaintiffs' argument is predicated upon matters brought before the court in this fashion. In our view, such asserted facts are not properly before the court. A consideration of such matters would in effect amount to a trial de novo, which we are without power to grant. Thus, much of plaintiffs' argument, predicated upon such immaterial matter, appealing as it is, must be discarded.

Another segment of evidence upon which much reliance is placed is the report made by the so-called Condon Committee. Dr. Edward U. Condon, Director of the National Bureau of Standards of the United States Department of Commerce was, under date of May 20, 1949, requested by the Chairman of the Senate Committee on Interstate and Foreign Commerce to organize a committee to give "sound, impartial, scientific advice" on color television. Dr. Condon was the head of this committee, which included a group of scientific persons of repute, none of whom were employed by or had any connection directly or indirectly

with any radio licensee or radio-equipment manufacturer. The report of this committee was released July 10, 1950, and considered at length the three color systems which had been proposed, and analyzed the present and potential performance of those systems. The report discloses that it took into consideration, among other matters, the testimony and demonstrations given before the Commission in the instant proceedings. No doubt this report refutes numerous of the findings made by the Commission and gives a far more favorable appraisal of the RCA system than that attributed to it by the Commission. Whether this report was considered by the Commission we do not know, but it is not referred to in the Commission's reports or its findings. As stated, this report was made to Congress, and we suppose a court could take judicial notice of it for some purposes, but again, in our view, it cannot be considered here for the purpose of impeaching the order of the Commission or the proceedings had before it. After all, Congress has conferred upon the Commission and charged it with the responsibility of conducting hearings and in reaching its own independent conclusions predicated thereon.

Another matter somewhat akin to those which we have just discussed was sought to be injected into this hearing by Pilot Radio Corporation, a plaintiff-intervenor. At the request of Pilot, two subpoenas duces tecum were issued out of this court on November 8, 1950, one addressed to the Commission and the other to CBS, requiring the production at the hearing in this matter of certain letters, documents, etc., described in said subpoenas. In response to the subpoenas the requested material was produced by the parties to whom the subpoenas were directed and lodged with the clerk of this court. At the same time, a motion was made to quash the subpoenas on the basis that the produced material was irrelevant and immaterial. The matter produced in the main consists of an exchange of letters between Honorable Edwin C. Johnson, Chairman of the Senate Interstate and Foreign Commerce Committee, and the Commission or members thereof, as well as correspondence exchanged between Senator Johnson and the officials

of CBS. In addition, there was offered in evidence at the time of the hearing an exchange of telegrams or letters between Senator Johnson and counsel for Pilot. We are advised by counsel that the purpose of these letters and telegrams is to show "that constant and vigorous pressure exerted by the Chairman" was responsible for the Commission's asserted precipitate action. The matter thus sought to be injected is, of course, no part of the record made before the Commission and it cannot be properly considered here. In this connection, we should point out that neither Pilot nor any other intervenor nor plaintiffs make any charge or allegation in their pleadings that the Commission in making its order was influenced, cajoled or coerced by Senator Johnson or anybody else. In fact, other than the incident under discussion, there is not even an intimation by any of the interested parties that the Commission acted other than in good faith and in discharge of what it considered to be its statutory duty. The motion to quash these subpoenas duces tecum not heretofore passed upon is allowed.

Another matter which perhaps should be mentioned arises from plaintiffs' contention that the Commission improperly relied upon the testimony and assistance of one of its staff engineers who it is asserted was an interested party because he was the inventor of an automatic switch usable with a non-compatible system such as that proposed by CBS. The witness was not the owner of and had no financial interest in the patent. He demonstrated the device on the record, to which an objection was made; however, no objection was made to his further testimony or participation in the proceeding. In fact, it appears that the matter was not again mentioned until raised in this court. It appears to us that the interest of the witness if it had any relevancy went to the weight or credit to be given his testimony, and that this was a matter for the determination of the Commission. In any event, it furnishes no basis for invalidating the Commission's order.

In the view we take of the case, there is no evidence under the pleadings which this court could properly hear. We take this view notwithstanding the suggestion made

by counsel for RCA in oral argument and reiterated in its brief, that RCA might desire to introduce witnesses at a final hearing. We gather from the suggestion made that such testimony would be offered for the purpose of showing current developments, which we suppose means developments since the entry of the order, which have been called to the attention of the Commission and which it refuses to consider. Plaintiffs disclaim that this would constitute a trial de novo. With this contention we do not agree. We reiterate that under well established principles our function is to hear and determine the questions before us solely on the record made before the Commission.

Thus, as we evaluate the situation, there are two courses open, (1) to allow defendants' motion for a summary judgment, and (2) to vacate the order and send the proceeding back to the Commission for further consideration in view of recent developments in the color television field as well as the rapidly changing economic situation. A pursuance of the latter course, assuming we have such authority, of which there may be doubt, would inevitably result in the prolongation of the controversy which badly needs the finality of decision which can be made only by the Supreme Court. In other words, the interests of all, so we think, will be better served with this controversy on its way up rather than back from whence it comes.

Even though we propose to allow defendants' motion for a summary judgment, it does not follow that the temporary restraining order heretofore entered should not remain in effect. In fact, we are definitely of the view that it should, until such time as the controversy is before the Supreme Court. While there may appear to be some inconsistency in pursuing this course, we think such procedure is within our discretion. In *National Broadcasting Co. v. United States*, 44 F. Supp. 688, a statutory court under circumstances quite similar to those here held it was without jurisdiction to review an order of the Commission, and dismissed the complaint. Even so, it granted a stay until the matter could be appealed to the Supreme Court. Holding that the District Court had jurisdiction the Supreme Court reversed. 316 U. S. 447. In doing so, it

suggested (page 449), "The stay now in effect will be continued, on terms to be settled by the court below." Thereupon, the case was tried by the District Court on its merits, a summary judgment allowed in favor of the defendants and the complaint again dismissed. And again the Commission's order was stayed pending appeal to the Supreme Court, and this time the judgment of the court below was affirmed. 319 U. S. 190. Insofar as we are able to discern from that opinion, the stay order allowed by the District Court remained in effect until the case was finally decided by the Supreme Court.

Thus concluding that the matter of a further stay of the Commission's order is discretionary, we shall state some of the reasons which move us to preserve the status quo. Of the nine million black and white television receivers in the hands of the public, there are none capable of receiving a picture either in color or black and white, broadcast under the proposed standards. In order to receive a black and white picture, it is necessary that a receiver be equipped with an adapter estimated to cost \$50.00, plus the expense of installation. In other words, it would cost the American public nearly one-half billion dollars to equip existing sets to receive, under the proposed system, black and white pictures, and even then admittedly they would be of a grade inferior to present black and white pictures. In addition, in order to receive a picture in color, it will be necessary to add to an existing receiver a converter, estimated to cost about \$100.00, plus the expense of installation. Thus, this will cost the public nearly one billion dollars. In other words, upon an expenditure by the public of one and one-half billion dollars, adapters and converters can be added to existing receivers so as to receive, under the proposed system, pictures in black and white and in color.

But this is only a part of the story insofar as it relates to the public. It was here stated in oral argument and not disputed that there are no adapters or converters on the market and that manufacturers would require a period of from six to eight months before they could be made available. So it seems reasonable to conclude that if the instant

order was now in effect, there would be no broadcasting under the proposed standards for many months, for the simple reason that there would be no sets capable of receiving such programs. And it does not square with common sense to think that manufacturers would rush into the business either of manufacturing adapters and converters for existing sets or manufacturing sets with built-in adapters and converters while this controversy is pending. And to maintain that the public in any considerable number would purchase adapters and converters, assuming they were available, under the existing state of doubt and uncertainty, is to cast a reflection on the intelligence of people.

Another matter which does not escape our attention is the insistence displayed by the defendants, including CBS, that this order at all hazards must become effective November 20, 1950, the date fixed by the Commission. This apparently was a magic date, so much so that defendants opposed a postponement until this court could have an opportunity to study and decide the issues presented. Perhaps the most substantial attack made upon the Commission's order is the adoption of standards which call for an incompatible system which, as admitted by all the parties including the defendants and CBS, is less desirable than a compatible system. Of course, the Commission's position in this respect is predicated upon its conclusion that no satisfactory compatible system was demonstrated, while the incompatible system which it approved was satisfactory. And the main argument against a stay of the order is that incompatibility is and will rapidly increase as the public continues to purchase existing receivers. As is stated in defendants' brief, "The grant by this court of an interlocutory injunction will encourage the increased sale of receivers requiring outside adaption to receive CBS color transmission in black and white. The difference between this cost and the cost of adapting receivers at the factory is the price the American public will pay if the Commission's decision is finally upheld." This argument is based on the assumption that the Supreme Court will sustain the validity of the order. It ignores a contrary possibility. Certainly this court is pos-

sessed of no such omnipotence, and we doubt if the Commission is. Even if the order was in effect, the owners of existing receivers could not within the next several months obtain the equipment which would enable them to receive the authorized broadcasts. But assume that they could and did so. Where would the public find itself in the event the order was held invalid by the Supreme Court?

In our view, the public interest in this matter has been magnified far beyond its true perspective. We are even told that this suit is a contest between television manufacturers and the public on some theory that it is to the financial gain of the former to refuse and delay the manufacture of television sets capable of receiving the broadcast authorized. Any merit in this contention, so we think, is completely overshadowed by what appears to be evident, that is, that the contest is mainly between two great broadcasting systems for a position of advantage in this rapidly developing field of television.

Another reason why this order should be stayed is the existing economic situation, recognized by Commissioner Sterling in his dissenting opinion, wherein he stated, "The problems confronting manufacturers today in terms of production, procurement and manpower to meet the demands of national defense are serious ones. * * It is well known that there are serious shortages of tubes and resistors as well as basic materials. * * Moreover, in many instances industry has been required to divert its TV engineering experts to problems of production for defense because of the close relationship of TV techniques to radar and other electronic devices the government requires." It is a matter of common knowledge that the situation thus described becomes more acute with each passing day, and the prospects are that it will be far worse before it is better. It is hardly conceivable that either the Commission or the government would under such circumstances desire, much less insist, that the order in controversy be made effective.

Our purpose is to restrain the effective date of the order until the aggrieved parties have had an opportunity to perfect an appeal to the Supreme Court. Therefore, the temporary restraining order heretofore entered will re-

main and continue in force until April 1, 1951, or until terminated by the Supreme Court. And we re-adopt the findings heretofore made in support of the continuation of such order.

A summary judgment will be entered in favor of the defendants and against the plaintiffs, and the complaint dismissed. No testimony having been heard or considered other than the record made before the Commission, no findings are required in support of such judgment.

LA BUY, D. J., dissenting:

It is conceded by all and it is self-evident that the best system of color television is a compatible one; that is, a system requiring no change whatever in existing receivers for the reception of black and white as well as color pictures. Indeed, compatibility is the coveted goal of all engineers and scientists engaged in the television industry.

In its order of October 11, 1950 (F3), the Commission stated:

"... that the state of the television art is such that new ideas and new inventions are matters of weekly, even daily occurrence;..."

And again, in recognizing the rapid developments in the field, the Commission said (B92, First Report):

"The third matter we refer to is the possibility of new color systems and improvements in existing color systems which have been informally called to our attention since the hearings closed. Of course, these are not matters of record and cannot be relied on in reaching a decision unless the record is reopened. In considering these developments the Commission is aware that the institution of these proceedings stimulated great activity in the color field and that since fundamental research cannot be performed on schedule, it is possible that much of the fruit of this research is only now beginning to emerge."*

Commissioner Sterling, dissenting with what he characterized the "premature action taken by the majority",

also stated among other reasons for his disapproval of the action of the Commission "new developments came fast in the closing days of the hearing and immediately thereafter". Commissioner Hennock, who also disagreed with the Commission's speedy action, expressed her views as follows,

"... in the light of the progress made in the development of color television since the start of the instant proceeding, I think it is essential to defer final decision in this matter until June 30, 1951.

"*** It is of vital importance to the future of television that we make every effort to gain the time necessary for further experimentation leading to the perfection of a compatible color television system. ***"

In its First Report, the Commission stated:

"... two difficult courses of action are open to the Commission. The first course of action is to reopen the record... The second course of action is to adopt a final decision.

"The advantage of the first course of action is that the Commission would not be compelled to speculate as to an important basis for its decision... The disadvantage is that it would postpone a final decision and hence would aggravate the compatibility problem.

"*** The advantage of the second course of action is that it would bring a speedy conclusion to the matters in issue and would furnish manufacturers with a real incentive to build a successful tricolor tube as soon as possible. *** The disadvantage is that the Commission's determination on an important part of its decision would be based on speculation and hope rather than on demonstrations."

On October 4, 1950 RCA petitioned the Commission to review the progress made in developing and perfecting the various systems before a final determination. It offered to show the Commission improvements in certain phases of their system about which the Commission expressed doubts. The Commission denied the petition giving among other

reasons that "delay in reaching a determination . . . would not be conducive to the orderly and expeditious dispatch of the Commission's business".

The Commission recognized and the record before the Commission is replete with evidence that rapid strides are being made toward the perfection of a fully compatible system. There is ample basis for the conclusion that the scientists laboring in the laboratories of the industry may soon resolve the problem of compatibility. In view of the admittedly fluid state of the art, it is difficult to understand why the Commission refused to hear additional evidence and chose instead a course of action, using its own words, based "on speculation and hope rather than on demonstrations."

It is estimated that the cost of conversion to the new standards set by the Commission will cost the public in excess of a billion dollars. If hope and speculation may lawfully be substituted for evidence as a foundation for an important part of its decision, it was an abuse of discretion not to have indulged this speculation and hope in the public interest. The Commission chose a speedy determination of an issue of great public interest in preference to the more patient consideration which the magnitude of the question warranted. To prohibit the broadcast of color in completely compatible systems, whether it is RCA or any other fully compatible system, is a bar to competition between compatible and incompatible color and is unreasonable and arbitrary.

It is my opinion the Commission's precipitous action in entering the order, the impact of which will require owners of television sets to install equipment at a cost of many hundreds of millions of dollars, and its refusal to hear additional evidence clearly indicates an abuse of discretion and constituted action which was arbitrary and capricious.

I would overrule the motion to dismiss and for a summary judgment and would restrain the enforcement of the order.

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF ILLINOIS, EAST-
ERN DIVISION

No. 50 C 1459

RADIO CORPORATION OF AMERICA, NATIONAL BROADCASTING
COMPANY, INC., AND RCA VICTOR DISTRIBUTING CORPORA-
TION, *Plaintiffs,*

vs.

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS
COMMISSION, *Defendants*

ORDER

This cause having come on to be heard on plaintiffs' motion for interlocutory injunction and for a temporary restraining order, and on defendants' motion for summary judgment and to dismiss the Complaint, and the Court having heard the arguments of counsel and having considered the briefs filed herein, and the Court being fully advised in the premises,

It is hereby ordered that the temporary restraining Order entered November 16, 1950 restraining and suspending the promulgation, operation and execution of the Order of the Commission of October 10, 1950, be and it hereby is continued in full force and effect until April 1, 1951, or until terminated by the Supreme Court of the United States, and the findings of fact and conclusions of law heretofore made in support of said temporary restraining order are hereby re-adopted.

It is further ordered that a summary judgment be and it hereby is entered in favor of the defendants and against the plaintiffs and the complaint is dismissed.

J. EARL MAJOR,

*Judge, United States Court of
Appeals, Seventh Circuit.*

PHILIP L. SULLIVAN,

*Judge, United States District
Court.*

Dissenting:

WALTER J. LABUY,

*Judge, United States District
Court.*

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF ILLINOIS, EAST-
ERN DIVISION

No. 50 C 1459

RADIO CORPORATION OF AMERICA, NATIONAL BROADCASTING
COMPANY, INC., AND RCA VICTOR DISTRIBUTING CORPORA-
TION, *Plaintiffs*,

vs.

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS
COMMISSION, *Defendants*

MEMORANDUM ORDER ENTERED JANUARY 23, 1951, BY
JUDGE MAJOR AND JUDGE SULLIVAN.

Ordered, with the consent of the parties to this cause, that the last paragraph of the order entered herein on December 22, 1950, be and it is hereby amended for the purpose of clarification, nunc pro tunc as of that date, to read as follows: "It is further ordered that a summary judgment be and it hereby is entered in favor of the defendants and against the plaintiffs, including the plaintiff-intervenors, and that the complaints, including those of the plaintiff-intervenors, are dismissed."

**IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION**

Civil Action No. 50 C 1459

**RADIO CORPORATION OF AMERICA, NATIONAL BROADCASTING
COMPANY, INC., AND RCA VICTOR DISTRIBUTING CORPORATION,
*Plaintiffs,***

against

**UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS
COMMISSION, *Defendants***

FINDING OF FACT AND CONCLUSIONS OF LAW

This cause coming on to be heard on the 14th and 15th days of November, 1950, upon a motion of plaintiffs for an interlocutory injunction, and for a temporary restraining order from and after November 20, 1950, in the event the motion for an interlocutory injunction is not determined by that date, which motion has been adopted and joined in by interveners Emerson Radio & Phonograph Corporation, Pilot Radio Corporation, Wells-Gardner & Co., Sightmaster Corporation, The Radio Craftsmen Incorporated, Television Installation Service Association, and Local 1031, International Brotherhood of Electrical Workers, AFL, and upon motions by defendants and the intervener, Columbia Broadcasting System, Inc. to dismiss the Complaint, or in the alternative for summary judgment, before the Honorable J. Earl Major, Chief Judge of the United States Court of Appeals, Seventh Circuit, and the Honorable Philip L. Sullivan and Walter J. LaBuy, Judges of the District Court of the United States for the Northern District of Illinois, Eastern Division, and upon all pleadings, affidavits and documents filed by the parties and upon consideration thereof and of the arguments of counsel for the respective parties, the Court, being advised in the premises, hereby makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. The Federal Communications Commission (hereinafter called the Commission) on October 10, 1950, adopted an Order amending the Commission's "Standards of Good Engineering Practice Concerning Television Broadcast Stations". The order adopted the color television system of the intervener, Columbia Broadcasting System, Inc., and precludes the transmission of the color television system proposed by plaintiff Radio Corporation of America and of all other proposed systems other than the one adopted.

2. The Order, to become effective on November 20, 1950, provides for the commercial broadcasting of color television on standards which are different from the existing standards for the commercial broadcasting of black and white television, which have been in effect since 1941.

3. There are now in the hands of the public approximately 9,000,000 black and white television receivers, none of which can receive any programs broadcast in accordance with the new standards promulgated by the Order.

4. To protect the service which they have been getting, the owners of these 9,000,000 black and white television receivers would have to spend millions of dollars in order to adapt their sets to receive programs broadcast on the new standards.

5. After such adaptation, programs broadcast under the new standards would be received only as a black and white picture having less than one-half the picture detail of the existing black and white service.

6. For the public to both adapt and convert the existing 9,000,000 television receivers so that they would receive in color the programs broadcast in accordance with the new standards would cost many more millions of dollars.

7. Plaintiffs, on October 17, 1950, brought this action to enjoin, set aside, annul and suspend the Commission's Order of October 10, 1950.

8. Plaintiffs have moved for an interlocutory injunction to restrain and suspend the promulgation, operation and execution of the Order, and for a temporary restraining order from and after November 20, 1950, in the event the

motion for an interlocutory injunction is not determined by that date.

9. The pending action in which this motion is made has been brought pursuant to the provisions of Section 402(a) of the Communications Act of 1934, as amended (47 U.S.C. Sec. 402(a)) and of Title 28, United States Code (28 U.S.C. Secs. 1336, 1398, 2284, 2321-25), and of Section 10 of the Administrative Procedure Act (60 Stat. 243; 5 U.S.C. Sec. 1009), providing for the judicial review of orders of the Commission of the kind here involved, and for the issuance of temporary relief against injury caused thereby.

10. Plaintiffs' motion for an interlocutory injunction and for a temporary restraining order has been adopted and joined in by all parties who have intervened seeking to vacate, set aside, suspend and annul the Commission's Order of October 10, 1950.

11. The Court, while having been advised in the premises, has not had sufficient time to consider fully the issues raised by the verified complaints and the affidavits filed by the parties prior to November 20, 1950, the effective date of the Commission's Order.

12. The plaintiffs and interveners, representing manufacturers, employees, a distributor, a television broadcaster, a proponent of a color television system, set owners and television servicemen will suffer irreparable damage if the Commission's Order is not restrained or suspended during the consideration and determination of the motion for an interlocutory injunction, by virtue of the impairment of the market acceptance of present television receivers and by virtue of the inability of present television receivers to receive any broadcast on the standards adopted by the Order without substantial expenditures which may prove to be useless. The foregoing is shown by: the affidavits of C. B. Jolliffe, sworn to on November 8, 1950; Walter A. Buck, sworn to on November 8, 1950; John H. McDonald, sworn to on November 8, 1950; Walter M. Norton, sworn to on November 9, 1950; Richard L. Hirsch, sworn to on November 13, 1950; Harold V. Levin, sworn to on November 13, 1950; and J. O. Reinecke, sworn to on November 13, 1950; the verified Complaints of Emerson Radio

& Phonograph Corporation, Wells-Gardner & Co., The Radio Craftsmen Incorporated, Television Installation Service Association, and Local 1031, International Brotherhood of Electrical Workers, AFL; and all other affidavits submitted in this action.

13. The temporary suspension of the aforesaid Order of the Federal Communications Commission pending a determination of the aforesaid motion for an interlocutory injunction will be in the public interest.

CONCLUSION OF LAW

Plaintiffs' motion for a temporary restraining order restraining and suspending until further order of this Court the promulgation, operation and execution of the Order of the Federal Communications Commission adopted October 10, 1950, effective November 20, 1950, should be granted.

Enter:

J. EARL MAJOR,
*Judge of the United States Court
of Appeals, Seventh Circuit;*

PHILIP L. SULLIVAN,
*Judge of the United States
District Court;*

WALTER J. LABUY,
*Judge of the United States
District Court.*

Dated: Nov. 16, 1950.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

Civil Action No. 50 C 1459

RADIO CORPORATION OF AMERICA, NATIONAL BROADCASTING
COMPANY, INC.

and

RCA VICTOR DISTRIBUTING CORPORATION, *Plaintiffs*

against

UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS
COMMISSION, *Defendants*

TEMPORARY RESTRAINING ORDER

Plaintiffs' motion for an interlocutory injunction and for a temporary restraining order from and after November 20, 1950 in the event the motion for an interlocutory injunction is not determined by that date, which motion has been adopted and joined in by interveners Emerson Radio & Phonograph Corporation, Pilot Radio Corporation, Wells-Gardner & Co., Sightmaster Corporation; The Radio Craftsmen Incorporated, Television Installation Service Association, and Local 1031, International Brotherhood of Electrical Workers, AFL, and defendants' and interveners' (Columbia Broadcasting System, Inc.) motions to dismiss the Complaint, or in the alternative for summary judgment, having come on for hearing before the Court, and the Court not having had sufficient time to consider fully the issues raised and the verified complaints and affidavits filed by the parties, and having determined that irreparable damage will result if the promulgation, operation and execution of the Order of the Federal Communications Commission adopted October 10, 1950, is not restrained and suspended pending determination of the motion for an interlocutory injunction and the aforesaid motions to dismiss the Complaint, or in the alternative for summary judgment,

and the Court having made its Findings of Fact and Conclusions of Law to such effect, it is hereby

Ordered that the motion for a temporary restraining order, restraining and suspending until further order of this Court the promulgation, operation and execution of the Order of the Federal Communications Commission adopted October 10, 1950, effective November 20, 1950, be and it hereby is granted; and it is further

Ordered that the promulgation, operation and execution of the aforesaid Order of October 10, 1950 be and the same hereby is restrained and suspended pending the further order of this Court.

Enter:

J. EARL MAJOR,
*Judge of the United States Court
of Appeals, Seventh Circuit;*

PHILIP L. SULLIVAN,
*Judge of the United States Dis-
trict Court;*

WALTER J. LABUY,
*Judge of the United States Dis-
trict Court.*

Dated: November 16, 1950.

APPENDIX B

TEXT OF STATUTES INVOLVED

Communications Act of 1934, as amended (47 U.S.C. § 151 et seq.)

§ 303. Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

• • •

(c) Assign bands of frequencies to the various classes of stations, and assigns frequencies for each individual station and determine the power which each station shall use and the time during which it may operate;

• • •

(e) Regulate the kind of apparatus to be used with respect to its external effects and the purity and sharpness of the emissions from each station and from the apparatus therein;

(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this chapter: *Provided, however,* That changes in the frequencies, authorized power, or in the times of operation of any station, shall not be made without the consent of the station licensee unless, after a public hearing, the Commission shall determine that such changes will promote public convenience or interest or will serve public necessity, or the provisions of this chapter will be more fully complied with;

(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest. (48 Stat. 1082).

• • •

§ 402. (a) The provisions of Title 28, relating to the enforcing or setting aside of the orders of the Interstate Commerce Commission, are made applicable to suits to enforce, enjoin, set aside, annul, or suspend any

order of the Commission under this chapter (except any order of the Commission granting or refusing an application for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, or suspending a radio operator's license), and such suits are authorized to be brought as provided in such Title 28. (48 Stat. 1093, as amended, 50 Stat. 197, 63 Stat. 108).

Judicial Code. (28 U.S.C.)

§ 1253. Direct appeals from decisions of three-judge courts

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges. (62 Stat. 928)

. . .

§ 1336. Interstate Commerce Commission's orders

Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission. (62 Stat. 931)

. . .

§ 2323. Duties of Attorney General; interveners

The Attorney General shall represent the Government in the actions specified in section 2321 of this title and in actions under sections 20, 23, and 43 of Title 49, in the district courts, and in the Supreme Court of the United States upon appeal from the district courts.

The Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made,

may appear as parties of their own motion and as of right, and be represented by their counsel, in any action involving the validity of such order or requirement or any part thereof and the interest of such party.

Communities, associations, corporations, firms, and individuals interested in the controversy or question before the Commission, or in any action commenced under the aforesaid sections may intervene in said action at any time after commencement thereof.

The Attorney General shall not dispose of or discontinue said action or proceeding over the objection of such party or intervenor, who may prosecute, defend, or continue said action or proceeding unaffected by the action or nonaction of the Attorney General therein. (62 Stat. 970, as amended 63 Stat. 105.)

Administrative Procedure Act (5 U.S.C. § 1001 et seq.)

§ 4. Except to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts—

(a) *Notice.*—General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are

impracticable, unnecessary, or contrary to the public interest.

(b) *Procedures*.—After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose. Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of sections 1006 and 1007 of this title shall apply in place of the provisions of this subsection.

(c) *Effective dates*.—The required publication or service of any substantive rule (other than one granting or recognizing exemption or relieving restriction or interpretative rules and statements of policy) shall be made not less than thirty days prior to the effective date thereof except as otherwise provided by the agency upon good cause found and published with the rule.

(d) *Petitions*.—Every agency shall accord any interested person the right to petition for the issuance, amendment, or repeal of a rule. (60 Stat. 238, 5 U.S.C. § 1003).

§ 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.

(a) *Right of Review*.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) *Form and Venue of Action*.—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal ac-

tion (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

(c) *Reviewable acts.*—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

(d) *Interim relief.*—Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

(e) *Scope of Review.*—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully

withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error. (60 Stat. 243, 5 U.S.C. § 1009).

(2858)